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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JONES DAIRY FARM,

Petitioner,

VS.

LOCAL NO. P-1236, UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO,

Respondent.

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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i.

Respondent's brief in opposition argues that the issue presented in this case does not warrant the attention of the Court. To support that proposition it quotes, on pages 5-6, a portion of Petitioner's answer to the petition for rehearing Respondent filed in the court of appeals. When the petition for rehearing was filed, the status of the case was entirely different than it is now. Both the district court and the court of appeals had vacated the arbitration award by applying the standard of review set forth in *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960). At that point the case was mine-run. But that was before the court of ap-

peals decided Petitioner's judicial review should be forfeited because Petitioner neither refused to arbitrate, thereby precipitating a prearbitration judicial determination, nor made an express declaration in the arbitration proceeding that it would pursue judicial review in event the arbitrator ruled against it. Whether or not the forfeiture is valid is the issue presented to this Court.

ii.

Respondent's brief in opposition asserts, on page 6, that the court of appeals has not departed from the *Steel Workers Trilogy* or from prior decisions of the Seventh Circuit. Petitioner takes emphatic issue with that assertion. Nothing contained in either the *Steel Workers Trilogy* or any prior decision of the Seventh Circuit requires an employer to refuse to arbitrate or to declare an intention to challenge an adverse award. And nothing in the Seventh Circuit cases cited by Respondent[1] even remotely suggests the contrary. The forfeiture concept adopted by the court of appeals in this case is an unprecedented departure from existing law.

iii.

Respondent's brief in opposition claims, on pages 6-7, that the court of appeals did not decide on rehearing that Petitioner forfeited its right to judicial review but rather reversed its prior holding that the award failed to draw its essence from the collective bargaining agreement. That is not accurate. The court of appeals explained that its prior decision was based upon "whether and how griev-

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[1] *Smith Steel Workers v. A.O. Smith Corp.*, 626 F.2d 596 (7th Cir. 1980); *Grisbaum v. Amalgamated Meat Cutters Local 73*, 696 F.2d 520 (7th Cir. 1982); *Local No. P-1236 v. Jones Dairy Farm*, 680 F.2d 1142 (7th Cir. 1982).

ously the arbitrator had erred."[2] It went on to state that "[w]e now think the appeal should be decided differently."[3] And then it proceeded to articulate its forfeiture concept.[4]

iv.

Respondent's brief in opposition states, on page 8, that "Petitioner seeks to make it appear that under the rationale of *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564 (1960), that it was precluded from raising any defense as to an arbitrator's authority." That is a misstatement of Petitioner's point, which is this: the arbitrator did have the authority to act because the grievance made a claim which, on its face, was governed by the collective bargaining agreement, *but*, under *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960), Petitioner should have been granted post-award access to judicial review to establish that the award failed to draw its essence from the collective bargaining agreement.

Dated this 19th day of August, 1985.

Respectfully submitted,

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[2] Appendix, p. 2.

[3] Appendix, p. 2.

[4] Appendix, pp. 3-4.